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FEB 19

CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1931

Nos. 469-470

GEORGE L. SHEARER,
Petitioner,

vs.

DAVID BURNET,
Commissioner of Internal Revenue,
Respondent,

and

WILLIAM A. W. STEWART,
Petitioner,

vs.

DAVID BURNET,
Commissioner of Internal Revenue,
Respondent.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF AMICI CURIAE

BURTON E. EAMES

R. GAYNOR WELLINGS

Amici Curiae

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MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE.

Now come Burton E. Eames and R. Gaynor Wellings, counsel for George L. DeBlois in an action brought by him against one Thomas W. White, Collector of Internal Revenue, which action is now pending in the United States District Court for the District of Massachusetts

(Law No. 4636), who were also counsel for Arthur N. Maddison in an action brought by him against said Thomas W. White, Collector of Internal Revenue, which action was decided by the United States District Court for the District of Massachusetts in favor of the plaintiff (40 Fed. (2d) 564), and on appeal by said Collector to the United States Circuit Court of Appeals for the First Circuit, was affirmed (45 Fed. (2d) 335), and say that the issue in said cases is the same as that presented for determination by the cases now before this Court and move for leave to file this brief and to argue orally as amici curiae in the cases now at Bar.

Respectfully submitted,

BURTON E. EAMES
R. GAYNOR WELLINGS

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BRIEF OF AMICI CURIAE.

These cases are before this Court upon writs of certiorari to review the decision of the United States Circuit Court of Appeals for the Second Circuit.

This brief is filed by Burton E. Eames and R. Gaynor Wellings, counsel for George L. DeBlois, in an action brought by him against one Thomas W. White, Collector

of Internal Revenue, which action is now pending in the United States District Court for the District of Massachusetts (Law No. 4636), who were also counsel for Arthur N. Maddison in an action brought by him against said Thomas W. White, Collector of Internal Revenue, which action was decided by the United States District Court for the District of Massachusetts in favor of the plaintiff (40 Fed. (2d) 564), and on appeal by said Collector to the United States Circuit Court of Appeals for the First Circuit, was affirmed (45 Fed. (2d) 335). The issue in said cases is the same as that presented for determination by the cases now before this Court and this brief is submitted on the basis of the facts presented by the cases now at Bar.

INTRODUCTORY STATEMENT.

These cases originated by way of petitions filed in the United States Board of Tax Appeals by George L. Shearer and William A. W. Stewart to procure a redetermination of a deficiency in their income taxes for the calendar year 1924 which had been assessed by the Commissioner of Internal Revenue.

The cases were heard by the United States Board of Tax Appeals upon an agreed statement of facts. The Board found in favor of the Commissioner of Internal Revenue in both cases and decided a deficiency existed for the year 1924 (18 B. T. A. 393). An appeal was taken by the petitioner in each case from the decision of the United States Board of Tax Appeals to the United States Circuit Court of Appeals for the Second Circuit.

The United States Circuit Court of Appeals for the Second Circuit affirmed the decision of the Board of Tax

Appeals (52 Fed. (2d) 17), and the petitioners in each case filed a petition in this Court for a writ of certiorari for a review of said decisions, said petitions being granted by this Court November 30, 1931.

The question involved in these cases is whether the 25% reduction prescribed by Sections 1200 and 1201 of the Revenue Act of 1924 applies to that portion of the petitioners' partnership income for the partnership fiscal year ended April 30, 1924, which accrued in the calendar year 1923 and which was required under the provisions of the law to be reported by the petitioners in their respective returns for the calendar year 1924.

The petitioners here contend that the decision of the United States Board of Tax Appeals and the Circuit Court of Appeals for the Second Circuit was wrong and that they are entitled to a deduction of 25% upon their income taxes computed upon the basis of their respective returns for the calendar year 1924, in which were included their partnership income for the partnership fiscal year ended April 30, 1924, under Sections 1200 and 1201 of Title XII of the Revenue Act of 1924. The respondent contends that the decision of the United States Board of Tax Appeals and the Circuit Court of Appeals for the Second Circuit was right and that Title XII of the Revenue Act of 1924 does not entitle the petitioners in these cases to any deduction.

STATUTES.

The pertinent statutes bearing on the issue in these cases are the following:

Revenue Act of 1924; (43 *Stat.* 275; *United States Code An. Title* 26, *Sec.* 959 (*a*)).

"Sec. 218. (a) Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity. There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year, or, if his net income for such taxable year is computed upon the basis of a period different from that upon the basis of which the net income of the partnership is computed, then his distributive share of the net income of the partnership for any accounting period of the partnership ending within the taxable year upon the basis of which the partner's net income is computed."

This provision is the same in every material respect as Section 218 (a) of the Revenue Act of 1921, and it was enacted without change as Section 218 (a) of the Act of 1926. It was again enacted without substantial change in Sections 181 and 182 (a) of the Revenue Act of 1928.

Revenue Act of 1924; (43 *Stat.* 261, 262; *United States Code An. Title* 26, *Secs.* 938 (*a*) (*b*)).

"Sec. 207. (a) If the taxpayer makes return for a period beginning in one calendar year (hereinafter in this subdivision called 'first calendar year') and ending in the following calendar year (hereinafter in this subdivision called 'second calendar year') and the law applicable to the second calendar year is different from the law applicable to the first calendar year, then his tax under this title for the period ending during the second calendar year shall be the sum of: (1) the same proportion of a tax for the entire period, determined under the law applicable to the first calendar year and at the rates for such year, which the portion of such period falling within the first calendar year is of the entire period; and (2) the same proportion of a tax for the entire period, determined under

the law applicable to the second calendar year and at the rates for such year, which the portion of such period falling within the second calendar year is of the entire period.

(b) If a fiscal year of a partnership begins in one calendar year and ends in another calendar year, and the law applicable to the second calendar year is different from the law applicable to the first calendar year, then (1) the rates for the calendar year during which such fiscal year begins shall apply to an amount of each partner's share of such partnership net income (determined under the law applicable to such calendar year) equal to the proportion which the part of such fiscal year falling within such calendar year bears to the full fiscal year, and (2) the rates for the calendar year during which such fiscal year ends shall apply to an amount of each partner's share of such partnership net income (determined under the law applicable to such calendar year) equal to the proportion which the part of such fiscal year falling within such calendar year bears to the full fiscal year. In such cases the part of such income subject to the rates in effect for the most recent calendar year shall be added to the other income of the taxpayer subject to such rates and the resulting amount shall be placed in the lower brackets of the rate schedule applicable to such year, and the part of such income subject to the rates in effect for the next preceding calendar year shall be placed in the next higher brackets of the rate schedule applicable to such year."

These provisions are similar in substance to provisions found in Section 205 of the Revenue Act of 1921. They were re-enacted without change as Section 207 (b) of the Revenue Act of 1926 and again as Section 182 (b) of the Revenue Act of 1928.

Revenue Act of 1924; (43 *Stat.* 353-354.)

Title XII—REDUCTION OF INCOME TAX PAYABLE IN 1924.

"Sec. 1200. (a) Any taxpayer making return, for the calendar year 1923, of the taxes imposed by Parts I and II of Title II of the Revenue Act of 1921 shall be entitled to an allowance by credit or refund of 25 per centum of the amount shown as the tax upon his return."

* * * * * * *

"Sec. 1201. (a) Any taxpayer making return, for a period beginning in 1922 and ending in 1923, of the taxes imposed by Parts I and II of Title II of the Revenue Act of 1921, shall be entitled to an allowance by credit or refund of 25 per centum of the same proportion of his tax for such period (determined under the law applicable to the calendar year 1923 and at the rates for such year) which the portion of such period falling within the calendar year 1923 is of the entire period.

(b) Any taxpayer making return, for a period beginning in 1923 and ending in 1924, of the taxes imposed by Parts I and II of Title II of this Act, shall be entitled to an allowance by credit or refund of 25 per centum of the same proportion of a tax for such period (determined under the law applicable to the calendar year 1923 and at the rates for such year) which the portion of such period falling within the calendar year 1923 is of the entire period."

ARGUMENT.

The following arguments and authorities are submitted in support of the contention of the petitioners in these cases that under the provisions of Sections 1200 and 1201 of the Revenue Act of 1924 they are entitled to a deduction of 25% from the tax upon their partnership income for the partnership fiscal year ended April 30, 1924, which accrued in 1923 and which was required under the provisions of the law to be reported by the petitioners in their respective returns for the calendar year 1924.

I.

Statutes Imposing Taxes Should Be Construed According to Certain Well Established Principles.

It is fitting at times to recall and restate even well-established rules and principles, particularly when they relate to fundamental rights of individuals and to their fundamental relations with governmental authority. Such restatement aids us in adhering to those rules and principles and in preventing their being unintentionally overlooked or disregarded. The following are worthy of consideration in this case.

In *Railway Company* v. *Philadelphia,* 101 U. S. 528, 537, Mr. Justice Clifford said:

> "Taxation is an act of sovereignty to be performed, so far as it conveniently can be, with justice and equality to all. * * * Common burdens should be * * * apportioned, as far as possible, in the ratio of justice and equity".

In *Knowlton* v. *Moore,* 178 U. S. 41, 77, Mr. Justice White said:

"We are, therefore, bound to give heed to the rule, that where a particular construction of a statute will occasion great inconvenience or produce inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute". (Citing cases).

In *Gould* v. *Gould,* 245 U. S. 151, 153, Mr. Justice McReynolds, in holding that alimony paid under decree of Court was not taxable as income under the income tax law of 1913, said:

"In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are *construed most strongly against the Government, and in favor of the citizen.*" (Citing cases.) (Italics ours.)

In *Stockyards Loan Co.* v. *Nichols,* 243 Fed. 511, 516, Munger, D. J., speaking for the Circuit Court of Appeals for the Eighth Circuit, said:

"In order to ascertain the intention of the Legislature * * * the Court may look to each part of the statute, to other statutes upon the same or relative subjects, to the old law upon the subject, to the evils and mischiefs to be remedied, and to the natural or absurd consequences of any particular interpretation." (Citing numerous cases.)

These are guiding principles in the construction of statutes relating to taxation and are important in the present case. Their bearing upon the following discussion will be obvious.

II.

The Sub-Title of that Portion of the Revenue Act of 1924 Providing the Reduction in Tax is Neither Significant nor Persuasive.

It may be argued on behalf of the Commissioner that the portion of the Revenue Act of 1924, in which these provisions for a reduction in the tax on 1923 income are found, is entitled "Title XII—Reduction of Income Tax Payable in 1924"; and that the provisions for reduction in tax should, therefore, apply only in the case of taxes literally "payable in 1924". The law is clear, however, that the sub-title cannot control the plain language of the sections which follow it. Whatever may be the rule in some of the states, particularly in the West and South, under the provisions of their respective state constitutions, whereby the title of an act must be broad enough to describe somewhat comprehensively the contents of the act, no such rule applies in considering Acts of Congress. Neither the title to an Act of Congress nor any sub-caption or sub-title relating to divisions of such act can be held to control the language of the enactment. The title or sub-title is only one element which may be considered with other surrounding circumstances, in case of a real ambiguity in the language, in order to determine what Congress really meant and intended.

In the early case of *Hadden* v. *Collector*, 5 Wall. 107, the Court said (p. 110):

> "The title of an act furnishes little aid in the construction of its provisions. Originally in the English courts the title was held to be no part of the act:—'No more,' says Lord Holt, 'than the title of a book is part of the book.' It was generally framed by the

Clerk of the House of Parliament, where the act originated, and was intended only as a means of convenient reference. At the present day, the title constitutes a part of the act, but it is still considered as only a formal part; it cannot be used to extend or to restrain any positive provisions contained in the body of the act. It is only when the meaning of these is doubtful that resort may be had to the title, and even then it has little weight. It is seldom the subject of special consideration by the legislature.

"These observations apply with special force to acts of Congress. Everyone who has had occasion to examine them has found the most incongruous provisions, having no reference to the matter specified in the title."

This case was cited in *United States* v. *Union Pacific Railroad Co.*, 91 U. S. 72, and the Court says (p. 82):

"It has been observed by this court, that the title of an act, especially in Congressional legislation, furnishes little aid in the construction of it, because the body of the act, in so many cases, has no reference to the matter specified in the title. *Hadden* v. *Collector*, 5 Wall. 110."

In *Sugarland Industries* v. *Bass*, 36 Fed. (2d) 375, (District Court, W. D. Texas, Austin Division), where the question was one of construction of the Revenue Act of 1921, the Court in its opinion says (p. 377):

"Where confusion in the meaning of an act arises out of difference in meaning between the words of the caption and those in the body of the act, effect should be given to the meaning of the words of the act."

In *Meischke-Smith* v. *Wardell*, 286 Fed. 785 (Circuit Court of Appeals, 9th Circuit), the Court in construing an Act of Congress, the sub-title of which was "War Tax

on Facilities Furnished by Public Utilities", said (p. 792):

> "It is next contended by the plaintiffs in error that the sub-title of the statute imposing this war revenue tax limits its scope to public utilities. We do not think it is necessary to resort to the sub-title of this statute for its correct interpretation. When the meaning of an act of Congress is ambiguous, resort may be had to the title, as well as to any other feature of the act, to remove such ambiguities; but when the intent is plain and the language of the statute clear and unambiguous, nothing is left to construction. The cases are numerous in the Federal Courts, as well as elsewhere, supporting this rule, and need not be cited. We think the taxation clause in this statute is perfectly plain and needs no construction to determine *that it is not so limited.*" (Italics ours.)

A writ of certiorari was denied in this case. 263 U. S. 699.

In *Holy Trinity Church* v. *United States*, 143 U. S. 457, where an act of Congress on the subject of the importation and migration of foreigners and aliens under contract to perform labor in the United States was under consideration, the Court says (p. 462):

> "Among other things which may be considered in determining the intent of the legislature is the title of the act. We do not mean that it may be used to add to or take from the body of the statute, *Hadden* v. *Collector*, 5 Wall. 107, but it may help to interpret its meaning. In the case of *United States* v. *Fisher*, 2 Cranch 358, 386, Chief Justice Marshal said: 'On the influence which the title ought to have in construing the enacting clauses much has been said; and yet it is not easy to discern the point of difference between

the opposing counsel in this respect. Neither party contends that the title of an act can control plain words in the body of the statute; and neither denies that, taken with other parts, it may assist in removing ambiguities. Where the intent is plain, nothing is left to construction. Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived; and in such case the title claims a degree of notice, and will have its due share of consideration.'"

The language quoted by the United States Board of Tax Appeals in the *Appeal of Charles Colip*, 5 B. T. A. 123, 126, from the reports of the Senate Finance Committee and of the House Ways and Means Committee contains a sufficient refutation of the argument that the reduction applies only to taxes payable in 1924, for it there appears that the committees estimated that the 25% reduction would reduce the amount of estimated tax receipts for the fiscal year 1925 almost as much as for the fiscal year 1924. These estimates clearly did not assume that the effect of the reduction would cease with the close of the calendar year 1924. A large amount of the taxes on 1923 income would doubtless be payable in the calendar year 1924 and this fact sufficiently accounts for the sub-title. If a reasonable equality between taxpayers requires the act to be interpreted as applying to 1923 income, whether the tax is payable in 1924 or 1925, this sub-title cannot import a sufficient limitation to control that interpretation.

That the provisions of this Title XII were not intended to be strictly limited to taxes payable in 1924 is evident from a consideration of Section 1201 (b), under which any taxpayer making return for a fiscal year

ending in 1924 is given the reduction of 25% on 1923 income. There is no limitation as to the date in 1924 when the fiscal year must end in order to entitle him to that reduction. If his fiscal year had ended November 30, 1924, his return would have been due February 15, 1925 (Revenue Act of 1924, Section 227 (a)) and the tax would have been due on the same date (Section 270 (a) (1)) or in four quarterly installments beginning on that date (Section 270 (b) (1)). In such case the entire payment is due not in 1924 but in 1925, yet there can be no doubt under the plain letter of the statute the taxpayer has the 25% reduction.

Since this sub-title does not restrict the reduction to taxes payable in 1924, it is an indication, it is submitted, of the intention of Congress that all 1923 income regardless of when the tax upon it may have been payable should receive the benefit of the reduction.

III.

Section 1200 (a) of the Revenue Act of 1924 (43 Stat. 353) Entitles the Petitioners to the Reduction They are Seeking.

The rule followed by the United States Board of Tax Appeals in several cases, which presented the issue now before this Court for determination, originated in the *Appeal of Charles Colip*, 5 B. T. A. 123. On the authority of the Colip case, the Board has decided the long list of cases succeeding it without any discussion of the principles involved. The contentions and decision of the Board of Tax Appeals as set forth in the *Appeal of Charles Colip*, supra, has been repudiated by the case of

White v. *Maddison*, 40 Fed. (2d) 564 (United States District Court, D. Massachusetts), which was affirmed by the Circuit Court of Appeals for the First Circuit (45 Fed. (2d) 335), whereas the Court below in the cases now before this Court has affirmed the result reached by the Board (52 Fed. (2d) 17).

It is respectfully submitted that the rule laid down by the United States Board of Tax Appeals in the *Colip* case is erroneous.

At the outset it should be noted that the Board of Tax Appeals in reaching its conclusion in the *Colip* case referred only to the provisions of Section 1200 (a) which by its terms relates to "any taxpayer making return for the calendar year 1923."

In the *Colip* case the Board resorts to an intricate and somewhat confusing discussion of Section 1200 (a) and concludes that under that section the petitioner was not entitled to the 25% reduction with respect to his partnership income accrued in 1923. The only reason for this conclusion apparently was that this partnership income was included in the petitioner's individual return for the calendar year 1924, filed in 1925, instead of being included in a return for an earlier period. Applying this reasoning to the present cases, if these petitioners had kept their personal accounts on a fiscal year basis, said fiscal year ending April 30, 1924; their returns would have been due July 15, 1924 (Revenue Act of 1924, Sec. 227 (a)), and this partnership income for the fiscal year of the partnership ending April 30, 1924, would have been included (Revenue Act of 1924, Sec. 207 (b); supra), or, if their personal fiscal year had ended even on November 30, 1924, their returns would have been due

February 15, 1925, and the same partnership income would have been included; and in either of these cases, we understand the Board would have conceded they were entitled to the 25% reduction on that part of the partnership income accrued in 1923. However, merely because their personal fiscal year was the calendar year 1924 and their individual returns were accordingly filed for that period, *the same partnership income for the same partnership fiscal year ending April 30, 1924, being under the law, included,* yet the reduction is denied them.

The reasoning of the Board in the *Colip* case, it seems, is substantially this, namely, that the income reported in the 1924 calendar year return, including the entire income for the partnership fiscal year ended during the calendar year 1924 (i. e., that which accrued in 1923 as well as that which accrued in 1924) "is all income of the later year", (p. 125); that Section 1200 (a) merely permits the taxpayer "not a retroactive reduction by way of recomputation of the 1923 tax, but a credit or refund of part of the tax assessed or collected upon 1923 returns under the 1921 Act" (p. 126); that the language of the Statute and the "plan of the reduction" are both contrary to the theory that it is in effect a reduction of the rate of tax for 1923 (p. 126). The Board quotes the language of Representative Green in explaining the plan of the Ways and Means Committee bill as finally adopted, as follows:

> "Of course, this flat reduction of 25% is not scientific, but it is something that everyone can understand. Even the man who runs may read this provision and know exactly what it means. He knows he is going to get one fourth off his taxes for this year . . .

> "It would be absolutely impossible at this time when the bill cannot be passed until after a number of parties have already paid their taxes and already made up their returns; and to put in force the system which is provided in the bill would produce utter chaos. There is only one way of getting at it, and that is the way suggested in the bill, by making a simple, flat reduction all the way through. * * *"

and infers, because the method adopted as the means of reducing the 1923 tax was to make a flat reduction of 25% from the tax computed at the rates in the 1921 schedule instead of substituting the reduced rates of the 1924 schedule for those in the 1921 schedule, that Congress did not intend thereby to reduce the 1923 rates (p. 126); that Congress adopted this method of the flat reduction in place of a revision of the 1921 rates as applied to 1923 income in order to prevent "utter chaos"; that the statute does not expressly provide a reduction in tax on 1923 income when that income is returned in an individual calendar year return for 1924; and finally, that the inequality brought about by this conclusion, whereby taxpayers in the situation of these petitioners are denied the reduction in tax on 1923 income "when in all reason the reduction was intended for all" is merely "accidental" and, therefore, not important.

We respectfully submit, that these arguments of the Board are not only quite intricate and confusing but that they are fallacious and cannot be sustained. Representative Green's statement above quoted that they intended to make "a simple flat reduction all the way through" so that "the man who runs may read this provision and know exactly what it means" indicates, to a mind searching for the practical intention of Congress and not dis-

posed to allow fine technicalities to obscure that intention, a purpose to make a "flat reduction" *with respect to the tax on* 1923 *income.*

The conclusion indicated by the Board of Tax Appeals that the entire income for the partnership fiscal year ended during 1924 "is all income of the later year", i. e. of 1924, is both surprising and unnecessary. In the first place it is quite inconsistent with the general understanding that as matter of law partnership income accrues to the individual partners as it is earned. A partnership is not a legal entity but is merely an aggregation of individuals under an express or implied agreement. The times of distribution of profits may be regulated by the terms of the agreement but those profits as they are earned necessarily accrue to the individuals in the proportions agreed upon between them, and to no one else. This is recognized by all the Revenue Acts here under consideration, in the provision that partners are *liable to income tax only as individuals.* Moreover, the idea that the Revenue Act makes the income of the partnership which accrued in 1923 technically income for the year 1924 for income tax purposes is inconsistent with the very statutory provisions we are discussing, because those provisions carefully distinguish between 1923 income and 1924 income and apply a special reduction in the tax on the 1923 income. If we attempt to apply this reasoning to the case of an individual making a fiscal year return—say for the fiscal year ending May 30, 1924—the doctrine argued by the Board would have to be stated thus, namely: that the entire income of the partnership fiscal year ended April 30, 1924 is all income of the individual's fiscal year ended May 30, 1924. This

statement obviously is meaningless; and we are therefore forced to conclude that income of 1923 remains income of 1923 and is not by some legal manipulation transmuted into income of 1924. It would be indeed strange if we were obliged to conclude that income accrued in 1923 is sometimes to be taxed at one rate and sometimes at another rate. The method prescribed by the Revenue Act of 1924 for including in a personal return of income the income received from a partnership was enacted, it is submitted, for purposes of convenience only because it obviates the necessity of filing two returns, one for partnership income and one for income received from other sources.

We hardly need mention that we are not arguing against the proportionate method adopted by Congress in Section 207 (b) for determining how much of the income accrued in 1923 and how much in 1924. We have no quarrel with the view of the Board of Tax Appeals to the effect that the apportionment of income to the respective calendar years in the ratio of the parts of the fiscal year which fall in those respective calendar years is entirely reasonable. We submit, however, that it is *not* reasonable, when once those proportions have been determined, to conclude that the income thus allocated to 1923 and presumably earned during that year should be taxed at 1924 rates, and should not have the benefit of the reduced rates which are prescribed for 1923, or to discriminate between taxpayers with respect to the tax on their 1923 income merely because they returned that income in a return filed on March 15, 1925, instead of in a return filed December 15, 1924 or February 15, 1925; and it seems a fair conclusion that neither Representa-

tive Green nor the Committee which he represented, when they were trying to devise a simple method for giving the taxpayers relief with respect to the tax on their 1923 income, which he who ran might read, had in mind any such distinction.

The inequality and unfairness of the result reached by the Board of Tax Appeals is apparent. We could hardly have a better example of this than the case suggested in the preceding paragraph. If the petitioners' individual fiscal year had ended November 30, 1924, they would clearly have been entitled to the reduction on this 1923 partnership income, even though their returns need not be filed until February 15, 1925, and their taxes were not due until that date, but since their individual fiscal year ended on December 31, 1924, thus corresponding with the calendar year, instead of on November 30, 1924, the same partnership income being included in either case, the rule laid down by the Board would deny them the reduction.

The Revenue Act of 1924 did not become law until June 2, 1924. At that date returns for the calendar year 1923, as also returns for fiscal years ending January 31, 1924 and February 29, 1924, would already have been filed and it was obviously much simpler and much less confusing to permit a flat 25% reduction in the tax as computed under the 1921 rate schedules instead of recomputing the tax under a new rate schedule. This being so, it was only natural to apply this same simple method of rate reduction for 1923 income to other taxpayers whose returns covering income part of which accrued in 1923 might be due on various later dates. If the reduction in the 1923 tax was to be extended to other taxpayers be-

sides those who had already filed their returns (and under the principles of equality it must be so extended) it was only logical to follow the same method of computation, namely, to compute the tax on 1923 income at the old 1921 rates in all cases and then apply the flat 25% reduction.

But the fact that this reduction in the tax on 1923 income was effected by first computing the tax at the old 1921 schedule of "rates" and then reducing the result by 25% does not mean that the *rate of tax* on 1923 income was not reduced—it clearly *was* reduced and the method adopted to bring about this result has to do only with the *method of computing the reduction.* "The man who runs" would so understand it and from any practical point of view any other conclusion seems quite unreasonable. He would understand, and properly so, that the rate of tax he must pay on 1923 income was reduced 25%.

This particular plan of reducing the rate of the tax which must be paid on 1923 income was adopted, as Representative Green stated, for practical reasons and we submit that the Board is reasoning inaccurately and fallaciously when it says that this plan of reduction is inconsistent with the idea that the rate of tax on 1923 income was being reduced. Certainly the application of this 25% reduction to all 1923 income whenever and however returned for tax, will bring about no "chaos" but only *equality* between taxpayers. Notwithstanding the fact that, with regard to returns already filed when the 1924 Act was adopted on June 2, 1924, the reduction necessarily required a credit or refund, it was nevertheless a "retroactive reduction by way of recomputation

of the 1923 tax" even though the reduction was computed by this simple practical method. As to taxes which had not then been paid, the 25% reduction from the amount otherwise shown by the return fixed the limit of the tax which was due; and all who made returns after the Act was adopted would properly show the reduced amount as the total amount of their tax. No taxpayer who had not paid was required to pay the full amount based on the old rates and then seek a credit or refund.

Even the Court below repudiates the position of the Board of Tax Appeals that the Revenue Act of 1924 did not effect a reduction of the rate of tax for 1923, when it says in its opinion at page 18: "By the Revenue Act of 1924 rates for income taxes were greatly reduced."

It seems hardly an answer to the suggestion that the conclusion reached by the Board will result in unequal treatment of taxpayers in the tax on their 1923 income, *based merely upon the time when their returns which include that income are filed,* to say that such inequality is "accidental", when another sensible interpretation of the statute will avoid that inequality. The interpretation adopted in the case of *Maddison* v. *White* (United States District Court, D. Massachusetts) 40 Fed. (2d) 564, affirmed by the Circuit Court of Appeals for the First Circuit (45 Fed. (2d) 335), does this and gives effect to what must undoubtedly have been the intention of Congress, that is, to treat all taxpayers alike with respect to their 1923 income.

It is respectfully submitted, therefore, that on the basis of the arguments above set out the rule established and followed by the Board of Tax Appeals cannot be sustained. It results in grave inequalities which are not the

result of any reasonable classification, but which depend merely on the particular time when the taxpayer's return which included his 1923 income was filed, and when his tax thereon was due.

The Court below also states that Section 1200 (a) does not afford the petitioners the relief which they ask, because it relates only to a taxpayer making a return for the calendar year 1923 and to show that no injustice results from this literal construction of that section it points out that under it the petitioners were entitled to a 25% deduction upon income of their partnership accruing during that part of the partnership fiscal year which fell within the calendar year 1922.

The answer to this position of the Court below is, first, that it has never been decided by any Court that Section 1200 (a) entitled a taxpayer to a 25% deduction upon partnership income accruing during that part of the partnership fiscal year which fell within the calendar year 1922. Of course, if the Department saw fit to allow such a deduction, it is hardly likely that a taxpayer would object, especially at a time when the rates were as high as those imposed by the Revenue Act of 1921. But that does not mean that Congress ever intended it and it does not seem that such a deduction should be allowed under Section 1200 (a). Second, that the case of *White* v. *Maddison* (Circuit Court of Appeals First Circuit), 45 Fed. (2d) 335, construes Section 1200 (a) in a manner which makes any such deduction impossible. By spelling out what the Court in that case considered to have been the intent of Congress, Section 1200 (a) is made to read as follows:

"Sec. 1200 (a) Any taxpayer making return for (income accruing in) the calendar year 1923 (though determinable in a later year), of the taxes imposed by Parts I and II of Title II of the Revenue Act of 1921 shall be entitled to an allowance by credit or refund of 25 per centum of the amount shown as the tax upon his return."

Construed in this manner the section makes no allowance for a deduction upon 1922 income. Third, the Court below, itself, is forced to admit that such a construction results in hardship. At page 20 of its opinion, the Court below says:

"There may be individual hardships, and a firm which did not exist in 1922 and began business in 1923 would be unable to obtain any refund under the remedial provisions of the Acts of 1924."

On the other hand, these instances of hardship can be entirely eliminated by construing Section 1200 (a) in the manner suggested either in *White* v. *Maddison,* supra, or in *Maddison* v. *White,* supra, which will entitle every individual, who made his return of income for 1924 on a calendar year basis and included therein his partnership income for a period which began in 1923 and ended in 1924, to the reduction provided for therein. Such a construction would, it is submitted, be in accord with the purpose which Congress intended to accomplish, as indicated by a wording of the provisions of Title XII of the Revenue Act of 1924, apart from the other provisions of the Act which other provisions, it is submitted, were not in the mind of Congress when Title XII was enacted for the reason that it was concerned only with granting relief to everyone from the high rates established by the Revenue Act of 1921, in a simple yet practical manner

and which intention was manifested by Representative Green when he said, "Of course, this flat reduction of 25% is not scientific, but is something that everyone can understand."

IV.

Section 1201 (b) of the Revenue Act of 1924 (43 Stat. 354), Entitles the Petitioners to the Reduction They are Seeking Because, as to Their Partnership Income, They Made a Return for "a Period Beginning in 1923 and Ending in 1924".

Whatever may be the merits of the case under Section 1200 (a) there is ample opportunity under Section 1201 (b) to reach the equitable result for which the petitioners are contending.

In the first place it is evident under Section 1201 that Congress did not intend to limit the reduction in the 1923 tax to cases where the 1923 income was reported for the calendar year as a whole. The intention was to apply the reduction generally to 1923 income *in all cases where returns included fiscal periods falling in part within the calendar year* 1923. In all such cases under Section 1201 the applicable rates of tax were made subject to the 25% reduction.

Again, under the express provisions of Section 218 (a), the taxpayers were *required* to include in their personal returns, which were filed on the calendar year basis, their "distributive share of the net income of the partnership for" the partnership fiscal year ended April 30, 1924. Can any other conclusion fairly be reached, therefore, but that the taxpayers, in so far as their partner-

ship income was concerned, *were making their returns "for a period beginning in* 1923 *and ending in* 1924"? Because of the accidental fact that their individual accounting period happened to be the calendar year, their returns of the partnership income for the fiscal year ended April 30, 1924, were made on March 15, 1925. If their individual accounting period had been the fiscal year ending April 30, 1924, or November 30, 1924, their returns would have been due July 15, 1924, or February 15, 1925. But the partnership income would have been the same in either case, namely, their "distributive share, whether distributed or not, of the net income of the partnership for" the fiscal year ended April 30, 1924. Although their returns were filed on March 15, 1925, and although they were made, so far as their *individual income* was concerned, for the calendar year 1924, yet so far as the *partnership income* was concerned, it was necessarily and truly, made "for a period beginning in 1923 and ending in 1924".

It is contended by the Court below, however, that Section 1201 (b) does not entitle the petitioners to the reduction therein provided because as it says in its opinion at page 19,

> "Sec. 1201 (b) is not applicable to a case where partnership income, and not the tax, is allocated between separate years as provided in the case of partnerships by Section 207 (b)."

That is to say, Sections 1201 (b) and 207 (b) prescribe different methods of computing taxes and for that reason cannot apply to the same income.

It is respectfully submitted that it does not follow from this observation of the Court below that the peti-

tioners are not entitled to the reduction provided by Section 1201 (b). Section 207 (b) is similar in substance to provisions found in Section 205 of the Revenue Act of 1921. They were re-enacted without change in Section 207 (b) of the Revenue Act of 1926, and again at Section 182 (b) of the Revenue Act of 1928. Thus, it appears that the substance of Section 207 (b) of the Revenue Act of 1924 has consistently appeared in many of the Revenue Acts. On the other hand, the same thing cannot be said of Section 1201 (b) of the Revenue Act of 1924, and the reason for this is that it was enacted by Congress to accomplish a special purpose at a special time, namely, to reduce the then existing rates on income which accrued in 1923, and thus, to give the benefit of the surplus in the treasury to the taxpayers. It is respectfully submitted, therefore, that in enacting Section 1201 (b) it was not the intention of Congress that it apply to taxpayers such as the petitioners in conjunction with Section 207 (b), but rather to apply to them apart from Section 207 (b) and without relation thereto.

V.

As the Effect of Sections 1200 and 1201 of the Revenue Act of 1924 was to Reduce the Final Rates for 1923, Section 207 (b) of the Same Act Clearly Applies and the Petitioners' Tax on 1923 Income Must Be Computed at the Reduced Rate.

It has been argued at some length that the Board of Tax Appeals was wrong in concluding that Congress in the 1924 Act did not intend to reduce the 1923 rates; that in fact and in legal intendment the whole purport

and effect of Sections 1200 and 1201 was to reduce by 25% the rates which were previously in effect for 1923; that under those Sections the reduction of 25% is given as to 1923 income *in all cases,*—not only where such income is returned in a calendar year return independent of other years, but also where such income is returned as part of some fiscal period falling in part in 1923. The same reduction is extended by Section 1202 to all 1923 income where it is included in a return for a period of less than a year "and beginning and ending within the calendar year 1923".

If this interpretation is correct, then it seems to follow that the petitioners are clearly entitled to relief under Section 207 (b). Sections 1200 to 1202 inclusive provided the method of dealing with the reduction in the cases specifically mentioned in those Sections but Section 207 (b) is the Section which specifically prescribes how the tax on partnership income shall be computed where the fiscal year of the partnership begins in one calendar year and ends in another. Under that section, where the partnership fiscal year began in 1923 and ended in 1924 that part of the partnership profits accruing in 1923 is made subject to tax at "the rates for the calendar year during which such fiscal year begins". To the ordinary understanding it would seem to require no argument that in the final result the income allocated to the calendar year 1923 must be taxed at the rates which are made *finally effective for that year* and that the rates which by the Revenue Act of 1924 were made finally effective for 1923 were 25% less than the rates prescribed in the 1921 schedules. There is surely no implication in Section 207 (b) that the application of

these final rates to 1923 income was to depend on *when this income was returned* by the individual partner.

The final rates for 1923 having been reduced by 25% the petitioners were right under Section 207 (b) in taking the deduction of that amount on their returns.

VI.

The Decision of the Court Below is Erroneous.

The reasons for the decision of the Court below may be summarized in the Court's own language where, at pages 18 and 19 of its opinion, it says:

> "We think it clear that none of the statutory provisions just quoted afford appellants the relief which they ask. Section 1200 (a) does not, for it only relates to a taxpayer making a return for the calendar year 1923, and Stewart and Shearer each made a return for the calendar year 1924. • • •"
>
> "Section 1201 (a) applies only to a taxpayer making a return for a period beginning in 1922 and ending in 1923. • • •"
>
> "Section 1201 (b) applies to a taxpayer making a return for a period beginning in 1923 and ending in 1924. The appellants were not making a return for such a period, but for the calendar year 1924. By its terms, section 1201 (b), as section 1201 (a), relates only to taxpayers reporting income for a fiscal year different from a calendar year—a situation not involved here. Section 1201 (a) covers only cases where a taxpayer, not a partner, is reporting income under section 207 (a) for a fiscal year. Under section 207 (a) section 1201 (b) deducts 25 per cent. from the proportion of the tax allotted under section 207 (a) to 1923. Section 1201 (b) is not applicable to a case

where partnership income, and not the tax, is allocated between separate years as provided in the case of partnerships by section 207 (b)."

In other words, the Court below holds that Sections 1201 (a) and 1201 (b) apply only to cases where the taxpayer, "not a partner" is reporting income under Section 207 (a) for a split fiscal year and since Section 207 (b) provides a different method for arriving at the tax than Sections 1201 (a) and 1201 (b), that neither of these latter sections have any application to partnership income.

What is the result of such a decision? If Sections 1201 (a) and 1201 (b) have no application to partnership income, it means that Section 1200 (a) is the only section which has such application. But the Court below holds that Section 1200 (a) applies only to those cases in which a return is made for the calendar year 1923 in the strictest sense of the words. If that is so, then no taxpayer, who is a member of a partnership, is entitled to a reduction under the Revenue Act of 1924, unless he made his 1923 return of income upon a calendar year basis. The Court below would not permit any taxpayer who made his return in 1923 or 1924 on a split fiscal year basis and included therein his partnership income to take any deduction under the Revenue Act of 1924 because to be consistent it would have to hold, first, that Section 1200 (a) would not apply for the reason that "it only relates to a taxpayer making a return for the calendar year 1923", and, second, that Sections 1201 (a) and 1201 (b) do not apply to Section 207 (b) which in turn deals with the method of calculating the tax on partnership income. That is, no taxpayer whose part-

nership income was included in his individual return for a split fiscal year ending in 1923 or 1924 would be entitled to the reduction provided by Title XII of the Revenue Act of 1924, because, as the Court below says in its opinion at pages 19 and 20:

> "The refund provided under Sections 1201 (a) and 1201 (b) is based upon a tax computed under Section 207 (a), because Sections 1201 (a) and 1201 (b) allow a refund on the 'proportion' of the tax for the entire fiscal year which the portion of the fiscal year falling within 1923 bears to the entire period. Such a 'proportion' of the tax is employed only in Section 207 (a). It has no relation to Section 207 (b) by which the 'income', and not a 'proportion' of the tax, is allocated between separate years. Therefore, a refund of 25 per cent. of the amount which is placed in the higher brackets under Section 207 (b) finds no warrant in the statute."

Such a result as that reached by the Court below when applied to an individual making his return of income upon a split fiscal year basis could not have been intended by Congress. Therefore, the very reasons which the Court below gives for denying the relief to the petitioners and which are advanced as insurmountable obstacles to the deduction they are seeking, show, it is submitted, that the result reached by the Court below is erroneous, and that the deduction should be allowed.

CONCLUSION.

In accordance with the arguments above set forth, it is respectfully submitted that the decision of the United States Circuit Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

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